

ESTATE OF RICHARD ANTHONY NUNES, JR.

MARCH 25, 1958.—Committed to the Committee of the Whole House and ordered to be printed

Mr. LANE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 7186]

The Committee on the Judiciary, to whom was referred the bill (H. R. 7186) for the relief of the estate of Richard Anthony Nunes, Jr., having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

The amendment is as follows:

Page 1, lines 8 and 9: Strike the words “, which claim is not cognizable under the Federal Tort Claims Act,”.

PURPOSE

The purpose of the proposed legislation is to pay the estate of Richard Anthony Nunes, Jr., deceased, the sum of \$10,000 in full settlement of all claims against the United States as the result of the explosion of a dud left by the United States Army at Nanakuli, Oahu, T. H.

STATEMENT

Richard Anthony Nunes, Jr., died on August 3, 1946, when a device, subsequently determined to have been an Army Mark II hand grenade, exploded and fatally injured him. That day, Richard Anthony Nunes, a 13-year-old boy at the time, and his 7-year-old cousin, Charles Martin, were near the place where their grandfather, Joseph Nunes, was building a corral. At about 11:20 in the morning Joseph Nunes heard a blast similar to a rifle report, and then heard his grandson cry out in pain. He turned and saw Richard Anthony Nunes, Jr., covered with blood. He ran to the boy, and before he could reach him, his grandson fell backward from a sitting position. The boy gasped several times and lay quiet.

It was determined that the cause of Richard Anthony Nunes' death was shock and hemorrhage due to the accidental explosion. The principal pathological findings were that the boy had suffered multiple lacerations and abrasions which were very extensive and penetrating. There were multiple fractured ribs and metacarpals, a fractured left clavicle, and a fractured right thigh. The left forearm was missing as the result of what the medical report termed a "traumatic amputation." There were multiple lacerations of the thoracic and abdominal viscera.

The fracture of the left clavicle was of the sort caused by a fragment of metal. That fracture was incomplete and consisted of a green-sticktype fracture with the splitting caused by a sharp-edged fragment of metal which was recovered. A large fragment of metal was taken from the boy's back in the manner described in the following language from the medical report furnished this committee:

Deep dissection into the soft tissues of the back produced a large fragment of metal presumably from either a mortar shell or a grenade, measuring approximately 3 by 4 centimeters.

The Department of the Army in its report to this committee observed that the wounds of the deceased indicated that the boy had been in a sitting position with the explosive held in both hands. The explosive had both a blast and fragmentation effect, and the damage was consistent with the propensities of a United States Army Mark II hand grenade. This is the type of hand grenade in use during World War II.

An officer of the United States Army Ordnance Corps on duty at Fort Shafter on Oahu, examined the site of the explosion on August 8, 1946. He examined the metallic particles removed from trees and structures within 15 feet of the explosion. His opinion, from the composition of the fragments, the radius of the explosion, and the apparent angle of fragmentation, is that the fragments were from an Army Mark II hand grenade. Coupled with this evidence is the fact that the site of the explosion was a mile and a half from an area used by the Army for combat training during World War II. The Army report notes that the training area, known as the Makua pocket, had not been checked and cleared of duds at the time of this explosion. That report further states that there is no evidence that the Nunes boy had ever had an Army hand grenade in his possession prior to the accident. Despite these facts the Army has indicated that it is opposed to the enactment of the bill for the reasons outlined in its report.

The committee has considered the facts of this case and has determined that the relief provided for in H. R. 7186 should be granted. As is evident from the Army report, the area near the Nunes property was used by troops for combat training during World War II. In fact after this accident the Army recovered many unexploded hand grenades from the training area. The committee finds that the facts of this case provide a reasonable basis for finding Government responsibility for permitting a hazardous condition to exist. Therefore the committee recommends that the bill be considered favorably.

DEPARTMENT OF THE ARMY,
Washington, D. C., July 3, 1957.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of the Army for the views of the Department of the Army with respect to H. R. 7186, Eighty-fifth Congress, a bill "For the relief of the estate of Richard Anthony Nunes, Junior."

This bill provides as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the estate of Richard Anthony Nunes, Junior, deceased, the sum of \$10,000. Such sum is in full settlement of all claims against the United States, which claim is not cognizable under the Federal Tort Claims Act, on account of the death of Richard Anthony Nunes, Junior, on August 3, 1946, as the result of the explosion of a dud left by the United States Army at Nanakuli, Oahu, Territory of Hawaii: *Provided*, That no part of the amount appropriated in this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

The Department of the Army is opposed to the enactment of this bill.

The late Richard Anthony Nunes, Jr., was born on September 25, 1932. On August 3, 1946, he and his 7-year-old cousin, Charles Martin, were with their grandfather, Joseph Nunes, on his property located at Nanakuli, Oahu, T. of H. At about 11:10 a. m. on this date there was a blast of heavy detonation from a commercial quarry located one-quarter of a mile from the front of the property and as a result, rocks fell into the frontal area causing the grandfather to make the boys take cover with him behind a shed located in the rear portion of the 60-foot-long yard. After the blast subsided, the grandfather and Charles Martin returned to the front of the yard while Richard Nunes remained in the rear. At approximately 11:15 a. m. the grandfather heard a sound like a rifle shot, turned and noticed that his grandson, Richard, had blood on him. By the time Joseph Nunes reached the boy he had fallen from his sitting position into a prone position. He died in his grandfather's arms within 5 minutes.

The deceased's wounds indicated that at the time of the explosion he was in a sitting position with an explosive held in both hands, resting it upon his right knee. The explosive apparently had both a blast (both hands were amputated) and a fragmentation effect (puncture wounds were present), and the extent of damage to the body of the deceased was consistent with the propensities of a United States Army Mark II, hand grenade, in use during World War II. Upon autopsy, a piece of metal, approximately 3 by 4 centimeters was removed from the soft tissues of decedent's back.

A first lieutenant, United States Army Ordinance Corps, on duty with the bomb-disposal squad at Fort Shafter, was called to the scene on August 8, 1946, and shown metallic particles removed from trees and structures located within a radius of 15 feet of the explosion.

This officer was of the opinion that the fragments were from a United States Army Mark II hand grenade because of the composition (cast metal); the small radius of the explosion; the type of wounds inflicted; the apparent angle of fragmentation; and the existence of an area known as Makua pocket about a mile and a half from the scene of the incident which was used as an Army combat training ground during World War II and never checked or cleared of duds. By affidavit dated November 23, 1956, this officer reiterated his opinion and stated that subsequent to this incident he had recovered many unexploded hand grenades from the Makua pocket.

Immediately following the incident, the grandfather, no doubt influenced by the close chronological relationship between the events, voiced the opinion to the investigating officers of the Honolulu Police Department that the explosion was a result of some object which had been hurled upon his property by the blasting operations at the nearby quarry. He also noted the presence of about four "quarry rocks" covered with lime and burnt powder at the scene of the explosion. The police, while admitting the possibility that the blasting had hurled the explosive into the area, were inclined to discount its probability as there was no evidence that any objects were observed falling into other than the front portion of the yard at the time of the blasting.

Upon referral of an identical bill, H. R. 12414, 84th Congress, for comment, the Department of the Army attempted to locate any official investigative files prepared at the time of the incident. When, after exhaustive search it was determined that such records were not now available, the Department instituted a reinvestigation of the incident. These factors necessitated considerable delay in the submission of this report. The fragments recovered from the area of the explosion in 1946 and that obtained from the body of the deceased were no longer available in the files of the Honolulu Police Department. On November 14, 1956, investigators located metal fragments in a tree near the explosion site and 2 other fragments were submitted by the deceased's father as having been found near the scene. Examination revealed that these fragments were not components of a United States Army Mark II fragmentation grenade and only 1 of them could have been a bona fide fragment from any military weapon. In addition, none of these fragments were of a nature likely to have been utilized in the blasting operation at the quarry. There is no evidence that any of these fragments were related to the explosion that killed Richard Anthony Nunes, Jr., although the file is devoid of other explanation of their presence at the scene. There is also no evidence that the Nunes boy ever had a United States Army hand grenade in his possession prior to the accident, although his uncle had taken small-caliber rifle rounds from all of his nephews on several occasions.

No claim for administrative relief was filed in this case with the United States Army, nor was any suit filed under the provisions of the Federal Tort Claims Act, which permitted such where death resulted from the negligence or wrongful act of a Government employee, on or after January 1, 1945 (60 Stat. 845). Suit upon this claim is now barred by the statute of limitations (28 U. S. C. 2401). Had claimants sought administrative or judicial relief they would have had the burden of establishing actionable negligence by a Government employee acting within the scope of his employment (*Rolon v. United States*, 119 F. Supp. 432 (D. C. P. R. 1953)), where

the United States District Court of Puerto Rico by summary judgment denied recovery in the absence of evidence that the portion of the shell picked up by the deceased from a road near an Army training area had been placed there by the negligent act of a Government agent or employee acting within the scope of employment; and *Porter v. United States* (128 F. Supp. 590 (D. C. S. Car. 1955), aff'd 228 F. 2d 389 (4th Cir. 1955)). Also, relief might have been denied on the ground that the deceased was contributorily negligent. (See *Porter v. United States*, *supra*; and *Paul v. United States*, civil No. 1392 (D. C. Hawaii 1956), where a 14-year-old boy was found contributorily negligent in handling an Army grenade.)

No reason has been furnished by the claimants for their failure to pursue the administrative and judicial remedies available to them at the time of the occurrence of this incident. It has been stated that "The purpose of the statute of limitations is to require any necessary litigation to be brought within such time as the particular facts and circumstances may be proved with the utmost certainty and before adequate proof has become stale or entirely lost" (34 Am. Jur. sec. 9 (Cum. Supp. 1955)). Because these claimants did not attempt to utilize their available remedies, no intensive investigation was made of the incident and crucial matters such as the question of the manner in which the boy came into possession of this explosive material may now be resolved only by speculation. For this reason, the Department is constrained to object to the enactment of this legislation.

It may be noted that the Congress has recently enacted private relief legislation awarding compensation in two "explosion" cases (Private Law 691, 84th Cong., approved June 19, 1956, for the relief of Mrs. Ella Madden and Clarence E. Madden; and Private Law 885, 84th Cong., approved August 6, 1956, for the relief of Mr. and Mrs. Herman E. Mosley, as natural parents of Herman E. Mosley, Jr.). However, request for relief in the Madden case was made slightly over 2 years after the date of the incident, and in the Mosley case in less than a month after the incident; thus enabling the Department of the Army to conduct an investigation and establish the relevant facts for the consideration of the Congress.

The cost of this bill, if enacted, would be \$10,000.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

WILBER M. BRUCKER,
Secretary of the Army.

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the first of these is the fact that the Central Government has been unable to secure the necessary funds to carry out its policy of land reform. The second is the fact that the Government has been unable to secure the necessary funds to carry out its policy of land reform. The third is the fact that the Government has been unable to secure the necessary funds to carry out its policy of land reform.

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